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FILED
FEB 5 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 369.

AMERICAN FARM LINES,
Appellant,
v.
BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

No. 382.

INTERSTATE COMMERCE COMMISSION,
Appellant,
v.
BLACK BALL FREIGHT SERVICE, et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Washington

BRIEF OF APPELLEES

~~Dealers Transit, Inc.~~, and United Transports, Inc.

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STATEMENT OF THE CASE

American Farm Lines, one of the appellants in these consolidated proceedings, filed an application before the Interstate Commerce Commission pursuant to statutory au-

thority contained in 49 U. S. C. A., § 310a(a) seeking to provide a single line motor carrier service from designated states in the central portion of the United States to designated states on and near the West Coast. Filed with the original application was the statement of support of the Department of Defense. An initial grant of authority based on the initial statement of support was temporarily enjoined by the Court below and prior to the time that the Court reached that matter for a final disposition, an order of the Interstate Commerce Commission was made reopening the proceedings for the receipt of additional support on behalf of the Department of Defense and for the receipt of additional protests on the part of all of the motor and rail carriers who desired to appear.

Following the receipt of the second round of support statements and protests thereto, supplemental proceedings were commenced in the Court below, again challenging the validity of the order of the Interstate Commerce Commission granting temporary authority to American Farm Lines, with the result that an expedited hearing was had and the decision of the three-judge District Court for the Western District of Washington, Southern Division, was filed March 26, 1969, and is reported at 298 Fed. Supp. 1006 (388a).

That decision presents at length the pertinent facts which are condensed in the foregoing paragraph.

The basis of the claim of the plaintiffs in the District Court below was that there had been a failure of compliance on the part of the applicant, American Farm Lines, with the rules of the Interstate Commerce Commission regarding the requirements for applications for temporary authority and support thereof and that there had been a violation on the part of the Interstate Commerce Commission of its duty under the statute which gives the Commission authority to consider applications for temporary authority.

The District Court found, in substance, that there had been a failure on the part of American Farm Lines properly to support its application and a failure on the part of the Commission properly to discharge its statutory function.

From this adverse decision, both American Farm Lines and the Interstate Commerce Commission have appealed.

In this Court, there are a number of appellees, all of whom operate as common carriers pursuant to authority granted them by the Interstate Commerce Commission. These include both rail and motor carriers whose interests are reflected by the several briefs filed and to be filed in this proceeding.

This brief is filed on behalf of the appellees, Dealers Transit, Inc. and United Transports, Inc., both motor carriers.

THE ISSUE

The determinative question raised by this appeal is whether the Rules and Regulations of the Interstate Commerce Commission governing applications for temporary authority apply to applications made by a farm co-op supported solely by the Department of Defense.[1]

RULES HAVE FORCE OF LAW

This Court, referring to its decision in **Accardi v. Shaughnessy**, 347 U. S. 260, held in **Service v. Dulles**, 354 U. S. 373, that:

> "Regulations validly prescribed by a government administrator are binding upon him as well as the citizen."

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[1] Briefs filed by appellants raise subsidiary questions and fact questions, neither of which determined the result below.

The rule was refined in **Atwoods Transport Lines v. U. S.**, 211 Fed. Supp. 168, 170, aff'd. per curiam 373 U. S. 377, in the District Court's language:

> "Rules . . . promulgated . . . pursuant to statutory authority . . . have the force and effect of law . . ."

This salutary pronouncement is not to be dissipated by such arguments that literal compliance is not required or those that advance that no harm can come through lack of compliance. If, as the government asserts, only "the most finicky notion" would require specification of deficiencies alleged against these and other carriers, then these concede that their representation has been indeed finicky. The law requires it.

THE APPLICABLE RULES

At the inception of motor carrier regulation, statutory basis for grants of temporary authority was lacking, later to be supplied by Congress at the request of the Interstate Commerce Commission to deal with emergency situations. These were defined in part as "urgent need" which "suddenly develops" by "conditions created by flood or other calamitous visitations".[2]

Thus moved, Congress enacted § 210a(a) of the Interstate Commerce Act [49 U. S. C. 310a(a)] authorizing the Commission to grant temporary motor carrier authority (1) "to enable the provision of service", (2) "for which there is an immediate and urgent need", (3) [where there is] "no carrier service capable of meeting such need".

With this statutory authority, the Commission dealt with applications under regulations promulgated in form that was lawfully changed as experience dictated and discharge of statutorily imposed duty required.[3]

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[2] Sen. Doc. No. 154, 75th Cong., 3rd Series, pp. 2-3.

[3] Events and changes prior to 1968 are not deemed consequential, and are thus not included.

On January 23, 1968, against a background of 30 years of dealing with such matters, the Commission recognized existing problems, undertook to rectify or alleviate them, and, by a policy release, reaffirmed its resolve to enforce the regulations promulgated in 1965 in Ex Parte 67, 98 M. C. C. 483, and clarified its policy. The Commission said:

> "Because of 'slipshod' preparation of many of the applications the Division frequently has found it difficult to reach an informed and equitable decision . . . Foremost among the complaints . . . are . . . failure of the applicant . . . to submit supporting statements which contain all the information required by § 240.2(c) of the temporary authority rules."

The Commission then warned:

> ". . . Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible . . ."[4]

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[4] Text of the Release, cited in footnote 5, p. 456, **Acme Cartage Co. v. U. S.**, 290 F. Supp. 453, is:

The following ICC policy release was issued January 23, 1968:

"POLICY CLARIFIED FOR ICC ACTION ON APPLICATIONS FOR TEMPORARY AUTHORITY TO CONDUCT MOTOR CARRIER OPERATIONS.

"Requests for temporary authority to conduct regulated motor carrier service will be turned down if the applications do not adequately comply with Interstate Commerce Commission rules.

"The clarified policy will be administered by Division 1, which handles operating rights matters.

"The Commission adopted this policy upon receiving recommendation from the Division because of the haphazard preparation of many of the more than 5,000 applications for temporary authority received annually. Most of the requests involve common carrier trucking. The applications usually result from an emergency or short term need of shippers, or when new products and commodities are developed and require immediate transportation services.

"Because of 'slip-shod' preparation of many of the applications, the Division frequently has found it difficult to reach an informed and equitable decision. Further investigation by the ICC staff often has been required in order to obtain necessary in-

Section 240.2(c) of the rules specifies eleven criteria as the minimum requirements of supporting statements, and makes no exceptions for the Department of Defense other than that its support might be furnished directly to the Commission uncertified.[5]

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formation. Foremost among the complaints in this area are those concerning failure of the applicant or his representative to submit supporting statements which contain all of the information required by Section 240.2(c) of the Temporary Authority Rules. These rules are set forth in Ex Parte No. MC-67, Motor Carrier Temporary Authorities, 98 MCC 483, and 49 CFR 1131 (formerly 49 CFR 340).

"According to the clarified policy, Division 1 will deny temporary authority applications in which, because of non-compliance with the rules, a fair adjudication is not possible on the record before the Commission, without prejudice, however, to the filing of a new application conforming to the rules."

[5] Ex Parte No. MC-67, 49 CFR 420.2, 49 CFR 1131.2, provides:

"(b) How and Where Filed. A separate application for each temporary authority sought must be filed on Form BOR-95 (§ 1003.1 of this chapter). The signed original and six copies of each application and all supporting documents must be filed with the Bureau of Operations Field Office which has jurisdiction over the point at which applicant is domiciled, or such other field office as the Commission may designate in special circumstances.

"(c) Supporting Statements. Each application for temporary authority must be accompanied by a supporting statement(s) designed to establish an immediate and urgent need for service which cannot be met by existing carriers, except that when the Department of Defense is the shipper such support may be furnished directly to the Temporary Authorities Board by the Washington office of that Department. Each such shipper's statement, except those submitted by the Department of Defense, must contain a certification of its accuracy and must be signed by the person (or an authorized representative thereof) having such immediate and urgent need for motor carrier service. Any such supporting statement must contain at least the following information:

(1) Description of the specific commodity or commodities to be transported (where the transportation of property is involved).

(2) Points or areas to, from, or between which such commodities or passengers are to be transported. (If service is needed to or from a territory or area rather than a spe-

Section 240.4(b)(4) forbade consideration of substitution of single line service as a single sufficient basis for temporary authority:[6]

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cific point or points, clearly describe such territory or area and furnish evidence of a broad need to justify the territorial grant of authority requested.)

(3) Volume of traffic involved, frequency of movement, and how transported now and in the past.

(4) How soon the service must be provided and the reasons for such time limit.

(5) How long the need for such service likely will continue, and whether the persons supporting the temporary application will support a permanent service application.

(6) Recital of the consequences if service is not made available.

(7) The circumstances which created an immediate and urgent need for the requested service.

(8) Whether efforts have been made to obtain the service from existing motor, rail, or water carriers, and the dates and results of such efforts.

(9) Names and addresses of existing carriers who have either failed or refused to provide the service, and the reasons given for any such failure or refusal.

(10) Name and address of motor carrier who will provide service and is filing application for temporary authority.

(11) If the person supporting the application has supported any prior application for permanent or temporary authority covering all or any part of the desired service, give the carrier's name, address, and motor carrier docket number, if known, and state whether such application was granted or denied and the date of such action, if known."

[6] "204.4(b)(4) Single-line service.—Generally, the desire of a shipper for single-line service in lieu of existing interchange or connecting-carrier service will not warrant a grant of temporary authority. A grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable of, or have failed in, meeting the reasonable immediate and urgent needs of shippers or receivers between the points or territories and in respect of the commodity or commodities involved."

REASON FOR RULES

Considered in a vacuum, rules pale into a lifeless unimportance of meaninglessness, and a slavish adherence to a rule simply because it is a rule runs counter to instinct of man. Reasons breathe life into rules, make them make sense, and require conformity, uniform application and enforcement. This is no abstract exercise, it is the very life blood of administrative regulation and of jurisprudence itself.

Why then does the Commission have temporary authority rules? It says to enable it to reach a fair adjudication, and it recognizes that to do so, it must have the information upon which such an adjudication can properly rest. In thirty years of experience in undertaking to provide service for which an immediate and urgent need has been shown where there was no carrier service capable of meeting such need, the Commission obviously had reached the conclusion that it could not discharge its duty to provide service unless it had possession of the facts. It had to be informed by the applicant and supporting shipper of what the need was before it could find that need to exist. Thus, it adopted the first five criteria of factual support. If then, from this it found a need at all, logically it progressed to the determination of the immediacy or urgency of such need, relying here on the next two criteria. These, if present, would form the basis for the first statutory specification if immediate and urgent need, and had the statute stopped here, perhaps the Commission would have and it could have, and its rules would have. But the statute also dictated that the need must be such that no carrier was capable of meeting it. Thus, the rules specified that the support should include (as number eight) efforts made to obtain service from existing carriers and results and (as number 9) designation of carriers who failed or refused to provide service and reasons given for such failure or refusal.

Patently, one who has not tried existing service should not be heard to complain of it, which number 8 is designed to prevent. Similarly, a carrier's service should not be condemned without the carrier being afforded an opportunity to be heard upon the matter, which number 9 is designed to prevent.

That the regulatory scheme is admirable is not argued. Neither is its effectiveness, where enforced, argued.

The mischief comes about not by enforcement but by the lack of it, or by its inconsistency. The pernicious[illegible]ness of ignoring rules is demonstrated here where carriers are condemned without a day in court, findings are made without support, and requisite findings either are not made at all or are incompatibly made.

We are still at a complete loss to understand or explain how the Commission could find the existence of an immediate and urgent need for the provision of service not met by existing carriers in a decision that recites:

> "That in balancing the scales of public interest, it is necessary to assure that the government's immediate and urgent transportation requirements be met by an expedited and flexible service which will be used to complement rather than replace existing services" (369a).

We are not aware that there is statutory authority to "complement" as distinguished from to "provide" service.

The reason for the rule is to furnish the Commission with facts on which fairly to adjudicate.

But, another reason also enlivens the rules.

Other carriers have a right to protest temporary as well as permanent applications, whether their interest be considered great or small. The two carriers on whose behalf

this brief is presented may possibly be considered to have a small interest in this grant of temporary authority for the obvious reason that they are concerned with the transportation of various kinds of vehicles and of heavy and cumbersome commodities (126a, 253a, 361a). But these are encompassed by the grant to American Farm Lines of unrestricted general commodity authority. To United Transports, Inc. and Dealers Transit, Inc., this is important, greatly important.

To enable carriers effectively to respond to allegations of failure or refusal of service, the rules recognize that they have a right to know with some measure of specificity what the complaints against them are, and the mere fact that such complaints may have been made by an arm of the government rather than by a private individual does not endow them with any sanctity. Unless given this information, required by the rules, effective protest is forestalled if not foreclosed, and protesting carriers are condemned without a charge.

Taken together, these two reasons not only support but compel the existence and enforcement of the rules.

RULES SUBJECT TO CHANGE

Committed to the Commission is not only authority to promulgate rules, but authority to change them. If the accumulated wisdom of the Commission dictated that the rules should contain an exception that would place transportation by a co-op for the government on a footing different from other transportation, the rules could be amended thus to provide. This is inherent in the exception already made and mentioned permitting the uncertified support of the Department of Defense to be sent directly to the Commission. But the authority generally to amend rules does not include the authority to amend them on a case by case basis.

NONCOMPLIANCE WITH THE RULES

It appears that the brief filed on behalf of the Interstate Commerce Commission concedes at pages 16 and 17 that there has been no compliance with the Rules of the Interstate Commerce Commission in this proceeding. As the District Court said.

> "The Caputo verified statement fails to show any efforts by the Department of Defense to obtain from existing carriers the service AFL seeks to provide or the identity of any existing carriers who failed or refused to provide the needed service and the reasons given for any such failure or refusal" (298 Fed. Supp. 1011).

There is every evidence in the record that the failure of the Department of Defense to comply with these particulars of the rules was occasioned by its recognition that compliance with the rules would compel denial of the authority sought.

Under date of April 30, 1968, Mr. Curtis L. Wagner, Jr., Chief, Regulatory Law Division of the Office of the Judge Advocate General of the Department of the Army, wrote to the General Manager of American Farm Lines, among other things:

> "However, the Department of Defense is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (12a).

On May 10, 1969, Col. Woodrow W. Atkins, Staff Judge Advocate, wrote:

> "However, the DOD is not in a position to state that there would be insufficient or inadequate service without American Farm Lines" (13a).

The support letter which formed the basis for the initial grant of temporary authority, dated May 15, 1968 (14a,

15a), made no effort at compliance with the rules and the subsequent statement of support (194a-209a) while longer is equally as deficient.

Perhaps this accounts for the Commission's statement that its authorization of service was "to complement" rather than to provide.

CONCLUSION

In granting authority in violation of its rules, the Commission also violated the rights of appellees. What the Commission did was not just unlawful, it was wrong.

This the District Court below recognized and thus corrected. The judgment should therefore be affirmed, for which in duty bound these appellees will ever pray.

Respectfully submitted

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